THAN SIEW BENG & ANOR v. KETUA PENGARAH JABATAN PENDAFTARAN NEGARA & ORS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-01-185-06-2015]
16 MARCH 2017

CONSTITUTIONAL LAW: *Citizenship – Operation of law, by – Adoption of child – Application for an order of declaration for child to be recognised as citizen of Malaysia and order of mandamus for MyKad identification card to be issued – Requirement of citizenship – Whether requirements of jus soli and jus sanguinis fulfilled – Identity of child's biological parents unknown – Failure to determine lineage of child – Whether requirements stipulated in art. 14(1)(b) of Federal Constitution read with s. 1(e) Part II Second Schedule of Federal Constitution satisfied*

CHILDREN AND YOUNG PERSONS: *Adoption – Citizenship – Operation of law, by – Application for an order of declaration for child to be recognised as citizen of Malaysia and order of mandamus for MyKad identification card to be issued – Requirement of citizenship – Whether requirements of jus soli and jus sanguinis fulfilled – Identity of child's biological parents unknown – Failure to determine lineage of child – Whether requirements stipulated in art. 14(1)(b) of Federal Constitution read with s. 1(e) Part II Second Schedule of Federal Constitution satisfied*

This was an appeal against the decision of the High Court in dismissing the appellants' application for judicial review for the following reliefs of: (i) an order of declaration that the child ('second appellant') was recognised as a Malaysian citizen; and (ii) an order of *mandamus* to compel the first respondent to issue a MyKad identification card or a citizenship certificate to the second applicant as a Malaysian citizen. At the time of the second appellant's birth on 29 September 1998 at a Poliklinik, a birth certificate was issued with the particulars of the adopted parents, the first appellant and his wife, who were stated as the biological parents. When the second appellant attained the age of 12, the first appellant applied for an identification card for the second appellant. The application was rejected as the first respondent had suspicions about the background of the second appellant and upon investigation, it was revealed that the second appellant was not the biological child of the first appellant and his wife. On discovery that the adopted parents of the second appellant had breached the relevant law in obtaining the second appellant's birth certificate, the first respondent revoked the said birth certificate and issued another birth certificate to reflect the facts surrounding the birth of the second appellant. As there was no information obtained with regards to the biological parents of the second appellant, the new birth

certificate contained no information pertaining to the biological parents and the relevant particulars were endorsed with 'Maklumat Tidak Diperolehi'. Both the first appellant and his wife were asked to apply for an adoption order under the Adoption Act 1952, which was granted. The appellants applied for citizenship by registration under art. 15A of the Federal Constitution but the same was rejected by the first respondent. Hence, encl. 1 was filed in the High Court seeking for various reliefs. The High Court Judge made a finding that the appellants had not fulfilled the requirement of s. 1(e) of Part II, Second Schedule of the Federal Constitution which was to be read with art. 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law. Hence, this appeal.

Held (dismissing appeal)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli ie*, place of birth; while s. 1(e) of Part II of the Second Schedule of the Federal Constitution ('not born a citizen of any country') encapsulates the requirement of citizenship by *jus sanguinis ie*, by blood or lineage. Thus, the second appellant would need to satisfy both requirements of *jus soli* and *jus sanguinis* in order to fulfil the requirements of art. 14(1)(b) and s. 1(e) of Part II, Second Schedule of the Federal Constitution. (paras 23 & 24)

(2) A plain reading of s. 1(e) 'was not born a citizen of any country' refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth. The only available documentary evidence - the second appellant's birth certificate - contained no information pertaining to the biological parents and the relevant particulars were endorsed with 'Maklumat Tidak Diperolehi'. Since the identity of the child's lawful and biological parents were unknown, it was not possible to determine the lineage of the second appellant that would enable the second appellant to be conferred citizenship by lineage *ie*, *jus sanguinis*. Therefore, the second appellant had not fulfilled the requirement to be a citizen by operation of law within the meaning of s. 1(e) of Part II of the Second Schedule of the Federal Constitution. Thus, the decision of the High Court was affirmed. (paras 35 - 38)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan semakan kehakiman perayu-perayu untuk relif-relif berikut: (i) perintah perisytiharan bahawa satu kanak-kanak ('perayu kedua') diiktirafkan sebagai warganegara Malaysia dan; (ii) satu perintah *mandamus* untuk mewajibkan responden pertama mengeluarkan kad pengenalan MyKad atau sijil warganegara kepada perayu kedua sebagai warganegara Malaysia. Pada masa perayu kedua dilahirkan pada 29 September 1998 di sebuah Poliklinik, satu sijil kelahiran dikeluarkan dengan butir-butir ibu bapa angkat, perayu pertama dan isterinya, yang dinyatakan sebagai ibu bapa

kandung. Apabila perayu kedua mencapai umur 12 tahun, perayu pertama memohon satu kad pengenalan untuk perayu kedua. Permohonan ditolak kerana responden pertama mempunyai syak wasangka berkenaan latar belakang perayu kedua dan apabila disiasat, didedahkan bahawa perayu kedua bukan anak kandung perayu pertama dan isterinya. Apabila didapati bahawa ibu bapa angkat perayu kedua telah melanggar undang-undang relevan dalam memperolehi sijil kelahiran perayu kedua, responden pertama membatalkan sijil kelahiran tersebut dan mengeluarkan sijil kelahiran yang baru untuk menggambarkan fakta-fakta berkenaan kelahiran perayu kedua. Kerana tiada maklumat diperolehi berkenaan ibu bapa kandung perayu kedua, sijil kelahiran baru tidak mengandungi apa-apa maklumat berkenaan ibu bapa kandung dan butir-butir relevan diendorskan dengan 'Maklumat Tidak Diperolehi'. Kedua-dua perayu pertama dan isterinya diminta memohon perintah pengangkatan bawah Akta Pengangkatan 1952, yang dibenarkan. Perayu-perayu memohon kewarganegaraan melalui pendaftaran bawah per. 15A Perlembagaan Persekutuan tetapi ia ditolak oleh responden pertama. Oleh itu, lampiran 1 difailkan di Mahkamah Tinggi bagi menuntut beberapa relif. Hakim Mahkamah Tinggi membuat dapatan bahawa perayu-perayu tidak memenuhi keperluan perenggan 1E Bahagian II, Jadual Kedua Perlembagaan Persekutuan yang dibaca dengan per. 14(1)(b) Perlembagaan Persekutuan untuk memperoleh kewarganegaraan melalui operasi undang-undang. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Perkara 14(1)(b) Perlembagaan Persekutuan merangkumi keperluan kewarganegaraan oleh *jus soli* iaitu tempat kelahiran; sementara s. 1(e) Bahagian II Jadual Kedua Perlembagaan Persekutuan ('not born a citizen of any country') merangkumi keperluan kewarganegaraan oleh *jus sanguinis* iaitu melalui keturunan. Oleh itu, perayu kedua perlu memenuhi kedua-dua keperluan *jus soli* dan *jus sanguinis* untuk memenuhi keperluan per. 14(1)(b) dan s. 1(e) Bahagian II, Jadual Kedua Perlembagaan Persekutuan.

(2) Bacaan perenggan 1(e) 'was not born a citizen of any country' merujuk pada perhubungan perayu kedua dengan ibu bapa kandungnya pada waktu dia dilahirkan. Keterangan dokumentar iaitu sijil kelahiran perayu kedua tidak mengandungi apa-apa maklumat berkenaan ibu bapa kandungnya dan butir-butir relevan diendorskan dengan 'Maklumat Tidak Diperolehi'. Oleh kerana identiti ibu bapa kandung kanak-kanak ini tidak diketahui, agak mustahil untuk menentukan keturunan perayu kedua yang membolehkan perayu kedua dikurniakan kewarganegaraan oleh keturunan iaitu *jus sanguinis*. Dengan itu, perayu kedua tidak memenuhi keperluan untuk menjadi warganegara melalui operasi undang-undang dalam maksud s. 1(e) Bahagian II Jadual Kedua Perlembagaan Persekutuan. Oleh itu, keputusan Mahkamah Tinggi disahkan.

A **Case(s) referred to:**

Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2016] 1 CLJ 736 HC ***(refd)***

Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [2008] 5 CLJ 42 CA ***(refd)***

Singh v. Commonwealth of Australia [2004] HCA 43 ***(refd)***

B **Legislation referred to:**

Evidence Act 1950, s. 103

Federal Constitution, arts. 14(1)(b), 15A, Second Schedule Part II s. 1(e)

For the appellants - N Surendran & Latheefa Koya; M/s Daim & Gamany

For the respondent - Mohd Rizal Fadzil & Habibah Haron; SFCs

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[Editor's note: For the High Court judgment, please see Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2016] 6 CLJ 934 (affirmed).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Badariah Sahamid JCA:

Introduction

E **[1]** This is an appeal against the decision of the learned High Court Judge who on 14 July 2014 dismissed the appellants' application for judicial review for the following reliefs:

(i) an order of declaration that the second applicant is recognised as a Malaysian citizen under art. 14(1)(b) of the Federal Constitution read with s. 1(e) Part II, Second Schedule of the Federal Constitution, and

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(ii) an order of *mandamus* to compel the first respondent to issue a MyKad identification card or a citizenship certificate to the second applicant as a Malaysian citizen.

G **[2]** After careful consideration of oral and written submissions of parties, appeal records as well as relevant authorities, we find no merits in this appeal. We therefore dismiss this appeal and affirm the decision of the learned High Court Judge. The grounds of our decision are set out below.

Background Facts

H **[3]** The background facts are adopted from the learned High Court Judge's grounds of judgment.

[4] The first appellant, a Malaysian citizen and one, Lim Lee Chiew are the adopted parents of the second appellant.

I **[5]** The second appellant is a minor who was born on 28 September 1998 at Poliklinik and Surgeri Wanita Taman Dato' Ahmad Razali Ampang.

[6] At the time of the birth of the second appellant, a birth certificate was issued with the particulars of the adopted parents, one Mr Than Siew Beng (the first appellant) and Madam Lim Lee Chiew, stated as the biological parents of the second appellant. At the time of the second appellant's birth, the adopted parents had also identified themselves as being legally married. (exh. TSB2 of encl. 3 at pp. 59-61 RR)

[7] Both the adopted parents had never disclosed the fact that they were not the biological parents of the second appellant or that they had taken the second appellant allegedly from a woman who had given birth to the second appellant at Poliklinik and Surgeri Wanita Taman Dato' Ahmad Razali Ampang ('the Poliklinik').

[8] When the second appellant attained the age of 12, the first appellant applied for an identification card for the second appellant using exh. TSB2 of encl. 3. The application was rejected as the first respondent suspected that the second appellant was not the biological child of the first appellant and his wife.

[9] Upon investigation, it was revealed that the second appellant was not the biological child of the first appellant and his wife. The second appellant was taken away from his biological mother soon after his birth at the Poliklinik and since then was raised by the first appellant and his wife.

[10] On discovery that the adopted parents of the second appellant had breached the relevant law in obtaining the second appellant's birth certificate (exh. TSB2 of encl. 3), the first respondent revoked the said birth certificate and issued another birth certificate in the form of exh. TSB6 of encl. 3 to reflect the facts surrounding the birth of the second appellant. As there was no information obtained with regards to the biological parents of the second appellant, exh. TSB6 contained no information pertaining to the biological parents and the relevant particulars were endorsed with "maklumat tidak di perolehi".

[11] Both the first appellant and his wife were asked to apply for an adoption order under the Adoption Act 1952, which order was granted on 4 June 2012. (exh. TSB10 of encl. 3 at pp. 80-81 RR)

[12] On 21 June 2012, the appellants applied for citizenship by registration under art. 15A of the Federal Constitution but the same was rejected by the first respondent. Hence encl. 1 was filed in this High Court seeking for various reliefs as stated therein.

[13] When encl. 1 came up for hearing before Her Ladyship Justice Zaleha Yusof on 1 August 2014, the appellants were only granted leave to pursue prayers (ii) & (iii) of encl. 1 reproduced below:

> (ii) Suatu deklarasi yang mengiktirafkan pemohon kedua diatas sebagai warganegara secara kuatkuasa undang-undang ("operation of law") dibawah Jadual Kedua, Bahagian II, Seksyen 1(e) Perkara 14(1)(b) Perlembagaan Persekutuan.

A (iii) Suatu perintah *mandamus* mengarahkan responden pertama untuk mengeluarkan kad pengenalan atau sijil pengesahan taraf kewarganegaraan yang mengiktirafkan pemohon kedua sebagai warganegara Malaysia secara kuatkuasa undang-undang ("operation of law") dibawah Perkara 14(1)(b) Perlembagaan Persekutuan.

B **Issues Before The High Court**

[14] The learned High Court Judge determined that the issues before the court were as follows:

(a) Whether the applicants (appellants) have fulfilled the requirement of art. 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law?

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(b) Whether citizenship can be acquired pursuant to an adoption order?

Findings And Decision Of The High Court

D **[15]** The learned High Court Judge made a finding that the appellants had not fulfilled the requirement of s. 1(e) of Part II, Second Schedule of the Federal Constitution which was to be read with art. 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law.

[16] International conventions, such as the convention on the rights of the E child (CRC) have no force of law as it has not been incorporated into municipal legislation.

[17] An adoption order does not confer a right of citizenship by operation of law consequent upon the making of an adoption order.

F **Grounds Of Appeal**

[18] The grounds of appeal before us may be summarised as follows:

(a) The learned High Court Judge had erred in law and fact in her failure to appreciate that the second appellant had satisfied the requirements of s. 1(e) of Part II, Second Schedule of the Federal Constitution, to be read G with art. 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law in that:

(i) the second appellant was born in Malaysia after Malaysia day;

(ii) the second appellant had resided in Malaysia his whole life;

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(iii) the second appellant is not a citizen of any country.

(b) The learned High Court Judge had erred in placing an excessive and unrealistic burden on the second appellant to locate the biological parents of the second appellant in order to determine their citizenship I status when it was clear they were unknown and could not realistically be located.

(c) The learned High Court Judge had failed to consider that the first appellant had made reasonable effort to locate the biological parents of the second appellant by placing an advertisement in the newspaper, as stated in the first appellant's affidavit in support.

(d) The learned High Court Judge erred in stating that the fact of adoption is not a relevant consideration in conferment of a right of citizenship by operation of law.

(e) The learned High Court Judge had erred in her failure to appreciate that there are provisions in domestic and international laws that compel avoidance of statelessness of the second appellant.

Our Judgment

[19] We note that when encl. 1 came up for hearing before Her Ladyship Justice Zaleha Yusof on 1 August 2014, the appellants were only granted leave to pursue prayers (ii) & (iii) of encl. 1, reproduced below:

(ii) Suatu deklarasi yang mengiktirafkan Pemohon Kedua diatas sebagai warganegara secara kuatkuasa undang-undang ("operation of law") dibawah Jadual Kedua, Bahagian II, Seksyen 1 (e) Perkara 14 (1) (b) Perlembagaan Persekutuan.

(iii) Suatu perintah *Mandamus* mengarahkan Responden Pertama untuk mengeluarkan Kad Pengenalan Kad atau Sijil Pengesahan Taraf Kewarganegaraan yang mengiktirafkan Pemohon Kedua sebagai warganegara Malaysia secara kuatkuasa undang-undang ("operation of law") dibawah Perkara 14(1)(b) Perlembagaan Persekutuan.

[20] Thus, we will only confine the issues in this appeal to the question of whether the second appellant has satisfied the requirements stipulated in s. 1(e) of Part II, Second Schedule of the Federal Constitution, to be read with art. 14(1)(b) of the Federal Constitution, to obtain citizenship by operation of law.

[21] The relevant provisions abovementioned are reproduced below:

Article 14. Citizenship by Operation of Law

(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) ...

(b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

[22] The above provision is to be read with s. 1(e) Part II of the Second Schedule which is reproduced below:

> Citizenship By Operation Of Law Of Persons Born On Or After Malaysia Day
>
> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Merdeka Day are citizens by operation of law, that is to say:
>
> (a)
>
> (b)
>
> (c)
>
> (d)
>
> (e) every person born within the Federation **who is not born a citizen of any country** otherwise than by virtue of this paragraph. (emphasis added)

Requirement Of *Jus Soli* And *Jus Sanguinis*

[23] Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli* ie, place of birth; while s. 1(e) of Part II of the Second Schedule of the Federal Constitution ("not born a citizen of any country") encapsulates the requirement of citizenship by *jus sanguini*s ie, by blood or lineage.

[24] Thus, it would appear that the second appellant would need to satisfy both the requirements of *jus soli* and *jus sanguinis* in order to fulfil the requirements of art. 14(1)(b) and s. 1(e) of Part II, Second Schedule of the Federal Constitution. (Refer to *Chin Kooi Nah v. Pendaftar Besar Kelahiran dan Kematian Malaysia* [2016] 1 CLJ 736; [2016] 7 MLJ 717).

[25] The doctrines of *jus soli* and *jus sanguinis* were explained in the case of *Singh v. Commonwealth of Australia* [2004] HCA 43, which was referred to in the case of *Chin Kooi Nah v. Pendaftar Besar Kelahiran dan Kematian Malaysia* [2016] 1 CLJ 736; [2016] 7 MLJ 717) at p. 762 (CLJ); p. 747 (MLJ) as follows:

> By the late nineteenth century, international law recognised two well established rules for acquiring nationality by birth: *jus soli* and *jus sanguinis* (the *Australian Legal Dictionary* (1997) defines *jus soli* to mean: a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place; and defines *jus sanguinis* to mean: a right of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth.

[26] There is no dispute that documentary evidence confirms that the second appellant was born after Merdeka Day in the Federation ie, in 1998 in a Poliklinik in Ampang. (exh. TSB6), thus fulfilling the requirement of *jus soli* in art. 14(1)(b) of the Federal Constitution.

Meaning Of, "Who Is Not Born A Citizen Of Any Country"

[27] The contentious issue is in respect of the requirement of *jus sanguinis* in s. 1(e) of Part II of the Second Schedule of the Federal Constitution, as expressed by the phrase, "who is not born a citizen of any country". For the purposes of this requirement, the material time to determine the status of the second appellant's lineage is at the time of his birth.

[28] The appellant's contention is that the requirements of s. 1(e) are fulfilled because:

(i) the second appellant was born in the Federation;

(ii) the second appellant had resided in Malaysia all his life; and

(iii) the second appellant is not a citizen of any country.

[29] It is a well-established principle of law that "he who asserts must prove". The burden of proof is on the appellants to establish a *prima facie* case on the balance of probabilities that the second appellant, "was not born a citizen of any country".

[30] Such rule of evidence is enunciated in s. 103 of the Evidence Act 1950 which provides:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person.

[31] In the case of *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42, it was held that in order to ascertain the citizenship status of the applicant, the burden is on the applicant to furnish the necessary documents, and the absence of such documents would be fatal to the applicant's claim.

[32] The learned High Court Judge had referred to the burden borne by the applicant in the following terms:

> This Court would have to examine the factual matrix of this case and determine whether the 2nd Applicant was "not born a citizen of any country". As stated in the affidavits filed herein, the 1st Applicant and his wife had sponsored the surgery of the biological mother of the 2nd Applicant and the 2nd Applicant was taken from his biological mother at the time of his birth at the Poliklinik. Therefore the burden is on the Applicants to show to this Court that the 2nd Applicant "was not born a citizen of any country".

[33] The learned High Court Judge had also found that the appellants had failed to prove that reasonable efforts had been made to determine the identity and citizenship status of the second appellant's biological parents. The learned High Court Judge ruled that the mere publication of an advertisement in the papers to solicit information on the identity and citizenship status of the second appellant's biological parents is insufficient.

In her grounds of judgment, she had stated thus:

> From the averment it would appear that the couple knew about the woman whom they have negotiated and finally paid for the medical bills relating to the birth. I believe there was no full and frank disclosure of facts pertaining to the identity of this woman. It would appear the Applicants had not made reasonable attempts to trace the whereabouts of the mother either from the Poliklinik and or even from the informant who could be identified and traceable in order to provide the full and frank facts about the mother.

[34] The learned High Court Judge had made findings of fact, in particular that the first appellant had not been forthcoming in disclosing the particulars of the second appellant's biological parents as such information on his lineage would determine whether or not the second appellant fulfils the requirement that he "was not born a citizen of any country".

[35] A plain reading of s. 1(e) "was not born a citizen of any country" refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth. The only available documentary evidence-the second appellant's birth certificate (exh. TSB6) contained no information pertaining to the biological parents and the relevant particulars were endorsed with "Maklumat Tidak Diperolehi".

[36] Since the identity of the child's lawful and biological parents are unknown, it is not possible to determine the lineage of the second appellant that would enable the second appellant to be conferred citizenship by lineage ie, *jus sanguinis.*

[37] Thus in our view, the second appellant has not fulfilled the requirement to be a citizen by operation of law within the meaning of s. 1(e) of Part II of the Second Schedule of the Federal Constitution. (Refer to *Chin Kooi Nah v. Pendaftar Besar Kelahiran dan Kematian Malaysia (supra)*)

[38] We cannot accept the contention of the appellants that the evidence that the second appellant was born in the Federation and had resided in the Federation all his life, as well as the absence of particulars on the second appellant's birth certificate in respect of his lineage can be construed as sufficient proof that the second appellant "was not born a citizen of any country". As was stated earlier, what is required is evidence of the second appellant's lineage, which evidence is absent.

[39] Thus, we agree with the finding of the learned High Court Judge that the second appellant has failed to prove on the balance of probabilities that the requirement of s. 1(e) of Part II of the Second Schedule of the Federal Constitution abovementioned has been satisfied.

[40] For the reasons aforementioned, we therefore dismiss this appeal and affirm the decision of the learned High Court Judge. We make no order as to costs.